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The Good Faith Exception to the Exclusionary Rule: Should It Be Applied in OSHA Proceedings

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I. INTRODUCTION

The United States Supreme Court developed the exclusionary rule to enforce the fourth amendment right to be free from unreasonable searches and seizures.[1] The exclusionary rule is an evidentiary doctrine which prohibits the admission of evidence in judicial proceedings against a defendant if such evidence was obtained as a result of an unconstitutional search of the defendant. Recently, the rule has been the subject of frequent attacks from both commentators and members of the judiciary who want the rule either modified or completely abolished.

The applicability of the exclusionary rule to Occupational Safety and Health Act (OSHA) proceedings is an unsettled area of the law. Although the United States Supreme Court has held that the fourth amendment is applicable to OSHA cases,[2] it has never applied the exclusionary rule in such a setting. As a result, the lower federal court decisions considering the question are in conflict.[3]

This comment will first analyze the development of the exclusionary rule in both the criminal and administrative areas of the

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1. Weeks v. United States, 232 U.S. 383 (1914). *See infra* notes 4-42 and accompanying text.

Many commentators have recounted the history and evolution of the exclusionary rule. *See, e.g.*, Bernardi, *The Exclusionary Rule: Is a Good Faith Standard Needed to Preserve a Liberal Interpretation of the Fourth Amendment?*, 30 DE PAUL L. REV. 51, 52-75 (1980); Jensen & Hart, *The Good Faith Restatement of the Exclusionary Rule*, 73 J. CRIM. L. & CRIMINOLOGY 916, 917-21 (1982); Leonard, *The Good Faith Exception to the Exclusionary Rule: A Reasonable Approach for Criminal Justice*, 4 WHITTIER L. REV. 33, 36-54 (1982); Note, *Confusion Regarding Exclusion: The Evolution of the Fourth Amendment*, 23 ARIZ. L. REV. 801, 802-10 (1981); Schlag, *Assaults on the Exclusionary Rule: Good Faith Limitations and Damage Remedies*, 73 J. CRIM L. & CRIMINOLOGY 875, 877-83 (1982); Schlesinger & Wilson, *Property, Privacy and Deterrence: The Exclusionary Rule in Search of a Rationale*, 18 DUQ. L. REV. 225, 228-38 (1980); Trant, *OSHA and the Exclusionary Rule: Should the Employer Go Free Because the Compliance Officer has Blundered?*, 1981 DUKE L.J. 667, 674-87 (1981); Wilson, *The Origin and Development of the Federal Rule of Exclusion*, 18 WAKE FOREST L. REV. 1073, 1073-1108 (1982). *See also* Stone v. Powell, 428 U.S. 465, 482-87 (1976).

2. Marshall v. Barlow's, Inc., 436 U.S. 307, 311 (1978).

3. *See* Note, *The Applicability of the Exclusionary Rule in Administrative Adjudicatory Proceedings*, 66 IOWA L. REV. 343, 343-44 (1981).

law. It will then review the criticisms currently being levied against the rule as well as examining the alternative having the most support—the use of a good faith, reasonable belief exception to the exclusionary rule. The comment concludes that, at least in OSHA proceedings, the good faith, reasonable belief exception should be employed.

II. Development of the Exclusionary Rule

The fourth amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[4]

The language of the amendment does not dictate how it is to be enforced nor does it provide any sanction for its violation. As a result, at common law and during the early development of American constitutional law, evidence obtained by investigative methods which violated the fourth amendment was freely admissible in trials against the victims of the unlawful searches and seizures.[5] An early United States Supreme Court decision to that effect was *Adams v. New York*,[6] which held that collateral issues regarding the legality of how evidence, otherwise admissible, was obtained, could not be raised in a criminal trial.[7]

The exclusionary rule appeared first in *Boyd v. United States*.[8] In that case, Boyd was forced by the trial court to produce his personal records which incriminated him by indicating that he was guilty of smuggling.[9] The United States Supreme Court combined the fourth amendment's illegal search and seizure provision and the fifth amendment's protection against involuntary self-incrimi-

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4. U.S. Const. amend. IV. The amendment was ratified in response to the unwarranted intrusions of British troops into the homes and business establishments of the American colonists. *See* Trant, *supra* note 1, at 669 n.14; Note, *supra* note 3, at 345. *See also* Stone v. Powell, 428 U.S. 465, 482 (1976).

5. C. McCormick, Law of Evidence § 165, at 365 (E. Cleary 2d ed. 1972). The common law view was that "the admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence." 8 J. Wigmore, Evidence § 2183, at 7 (J. McNaughton rev. ed. 1961). *See also* Wilson, *supra* note 1, at 1074-76; Trant, *supra* note, 1 at 674; Note, *supra* note 3, at 344.

6. 192 U.S. 585 (1904).

7. *Id.* at 595-97.

8. 116 U.S. 616 (1886).

9. *Id.* at 617-18.

nation, holding that the personal records were inadmissible.[10] The Court reasoned that there is no difference between the seizure of a defendant's private records and forcing a defendant to testify against himself.[11] The Court went on to find that requiring Boyd to produce his personal records amounted to an unreasonable search as well as an involuntary self-incrimination, and concluded that the personal records were not admissible at trial.[12]

The case generally credited with originating the exclusionary rule is *Weeks v. United States*.[13] That case involved the right of the government to retain personal property seized in violation of the fourth amendment for the purpose of admitting it into evidence.[14] The *Weeks* Court found that the defendant's fourth amendment right was denied when he requested that the government return the illegally seized property and the government failed to do so.[15] As a remedy for this constitutional violation, the Court held that the government could not use the unlawfully retained evidence against the defendant in a criminal trial.[16]

The *Weeks* decision changed the prior law concerning the return of illegally seized personal property[17] by providing that such property must be returned to its owner and is not admissible at trial.[18] The Court felt that some restrictions on the use of illegally seized evidence were necessary to keep the guarantees of the fourth amendment from becoming nullities.[19] Also involved in the deci-

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10. *Id.* at 634-35.

11. *Id.* at 633.

12. *Id.* at 633-35. It should be noted that the *Boyd* holding dealt only with the seizure of items which the owner had the right to possess. The *Boyd* Court stated that the remedy for the illegal seizure of goods that the defendant had no right to possess is an action for damages in trespass, not the exclusion of the evidence at trial. *Id.* at 627-29. In the subsequent case of *Adams*, the Court held that evidence found in execution of a search warrant is admissible, even if such evidence is the defendant's personal property. 192 U.S. at 597.

13. 232 U.S. 383 (1914).

14. *Id.* at 393.

15. *Id.* at 398.

16. *Id.*

17. *See* Wilson, *supra* note 1, at 1087-90. The weight of precedent prior to *Weeks* was that the defendant's right to possession of his property was postponed until the needs of justice were satisfied. *Id.* at 1089-90. According to the then existing law, the defendant in *Weeks* had only a civil remedy against the wrongdoer, which would have no effect on the criminal process. *Id. See* Adams v. New York, 192 U.S. 585, 595-97 (1904). *See also supra* note 5 and accompanying text.

18. It should be noted that the violation of the fourth amendment in *Weeks* was the failure to return illegally seized property which the defendant had the right to possess. The *Weeks* Court did not hold that illegally seized contraband could not be admitted against a defendant in a criminal trial. *See* Wilson, *supra* note 1, at 1084-90.

19. 232 U.S. at 393. The *Weeks* Court stated the the failure to exclude evidence seized

sion was the feeling that the judicial system should not sustain convictions based upon evidence obtained through illegal searches and seizures, as this amounted to condoning the unconstitutional behavior.[20] Subsequent to *Weeks*, the federal courts used the *Weeks* rationale to exclude from evidence all property obtained in violation of the fourth amendment, including goods which the defendant had no right to possess.[21]

In *Wolf v. Colorado*,[22] the United States Supreme Court held that the provisions of the fourth amendment applied to the states through the fourteenth amendment, but that the exclusionary rule is not applicable to state court proceedings since it is not required by the fourth amendment.[23] This holding that the exclusionary rule was not of constitutional origin, a reversal of the position taken in *Weeks*, was justified on the grounds that each state should consider the opinions of its citizens in enforcing the fourth amendment right.[24] The *Wolf* decision was later reversed in *Mapp v. Ohio*,[25] which required that the state courts apply the exclusionary rule in criminal cases.[26] The *Mapp* Court returned to the position adopted in *Weeks* and declared that the exclusionary rule was required by the fourth amendment to protect the defendant's constitutional right of privacy.[27] Further justification for the required use of the exclusionary rule in criminal cases was provided by the arguments involving judicial integrity[28] and deterrence of future fourth amendment violations.[29]

Since the *Mapp* case, the United States Supreme Court has abandoned the position that the exclusionary rule is required by the fourth amendment, and has given only cursory treatment to

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in violation of the fourth amendment is a denial of the defendant's constitutional rights. *Id.* at 398.

20. *Id.* at 394.

21. *See* Wilson, *supra* note 1, at 1090. *See also* Stone v. Powell, 428 U.S. 465, 497-98 (1976) (Burger, C.J., concurring). *See generally* Trant, *supra* note 1.

22. 338 U.S. 25 (1949).

23. *Id.* at 28-33.

24. *Id.* at 28-30.

25. 367 U.S. 643 (1961).

26. *Id.* at 655. The Court noted that the other remedies for violations of the fourth amendment were worthless and futile. *Id.* at 651-52.

27. *Id.* at 654-55. The Court stated that without the exclusionary rule, the fourth amendment would be valueless, a mere "form of words." *Id.* at 655.

28. The Court felt that the integrity of the judicial system requires the exclusion of tainted evidence. *Id.* at 659-60.

29. *Id.* at 655-56. One year before the *Mapp* case, the United States Supreme Court had first used the deterrence of future constitutional violations as a justification for the exclusionary rule. Elkins v. United States, 364 U.S. 206 (1960).

judicial integrity as a justification for the rule.[30] The remaining justification for the continued use of the exclusionary rule is the belief that it acts to deter future violations of the fourth amendment by investigating officials.[31] *Linkletter v. Walker*[32] was the first case after *Mapp* to hold that deterrence of future unlawful conduct is the primary justification for the exclusionary rule.[33] Since then, the Court has consistently held that the primary purpose, if not the sole purpose, of the exclusionary rule is the deterrence of future constitutional violations by investigating officials.[34]

Besides limiting the purposes behind the exclusionary rule, the most recent United States Supreme Court cases have limited the situations to which the rule applies. In *United States v. Calandra*,[35] the Court refused to extend the exclusionary rule to grand jury proceedings.[36] The *Calandra* Court reasoned that there would be very little incremental deterrent effect produced by applying the rule in those proceedings.[37] Similarly, the Court has refused to extend the exclusionary rule to cases involving retroactive application of a statute limited or overruled by a United States Supreme Court decision,[38] federal civil cases involving evidence un-

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30. *See generally* Schlesinger & Wilson, *supra* note 1; Recent Development, *Limiting the Application of the Exclusionary Rule: The Good Faith Exception*, 34 VAND. L. REV. 213 (1981). *See also* Stone v. Powell, 428 U.S. 465 (1976); United States v. Janis, 428 U.S. 433 (1976); United States v. Peltier, 422 U.S. 531 (1975); United States v. Calandra, 414 U.S. 338 (1974).

31. *See* Trant, *supra* note 1, at 679-87; Wilson, *supra* note 1, at 1105-07. *See generally* Note, *supra* note 1; Schlesinger & Wilson, *supra* note 1.

32. 381 U.S. 618 (1965).

33. *Id.* at 636-37.

34. *See* Stone v. Powell, 428 U.S. 465 (1976); United States v. Janis, 428 U.S. 433 (1976); United States v. Peltier, 422 U.S. 531 (1975); United States v. Calandra, 414 U.S. 338 (1974).

Many commentators have criticized the inconsistent manner in which the Court has applied the exclusionary rule over the years, noting the shifts in the foundation and the rationale given for its application or non-application. One writer has reasoned that the Court faces the dilemma of either modifying the rule and overturning years of constitutional precedent or excluding reliable evidence from the trier of fact. This has caused a series of compromises to restrict the type of case to which the rule applies and to redefine the rights that the rule protects. Bernardi, *supra* note 1, at 74-75. *See generally* Schlesinger & Wilson, *supra* note 1; Recent Development, *supra* note 30.

35. 414 U.S. 338 (1974).

36. *Id.* at 350-51.

37. *Id.* at 351.

38. United States v. Peltier, 422 U.S. 531 (1975). In *Peltier*, the Court held that when officials act in accordance with a federal statute in obtaining evidence used to convict a defendant, the exclusionary rule will not be retroactively applied if the statute is later limited or overruled by a Supreme Court decision. *Id.* at 541-42.

lawfully obtained by state officials,[39] and federal habeas corpus cases,[40] because there would be little, if any, additional deterrent effect of such application. The culmination of these cases was the approach announced in *Stone v. Powell*,[41] that a court must balance the additional deterrent effect of applying the exclusionary rule in a particular instance against the additional costs to society in excluding relevant, probative evidence of the defendant's guilt.[42]

III. Development of Administrative Search and Seizure Law

A. *General Case Law*

Although the United States Supreme Court had, at an early date, ruled that business locations are protected by the fourth amendment in criminal searches,[43] it originally found that administrative agency investigations of businesses were exempt from the prohibition of warrantless searches.[44] In *Frank v. Maryland*,[45] the Court focused on the issue of whether administrative searches conducted without a search warrant are unreasonable, and found that the interests of society which are protected by the administrative agency are more important than the privacy right protected by the fourth amendment.[46] Thus, an administrative search could be legally conducted even if it violated the Constitution.[47] This position was later overruled by the companion cases of *Camara v. Municipal Court*[48] and *See v. City of Seattle*,[49] which held that fourth

39. United States v. Janis, 428 U.S. 433 (1976). In *Janis*, the Internal Revenue Service was allowed to admit evidence in a federal civil tax proceeding even though that evidence was obtained by state officials pursuant to a search warrant found to be defective. *Id.* at 454.

40. Stone v. Powell, 428 U.S. 465 (1976). In *Stone*, the Court refused federal review of a state court conviction where the defendant claimed that the prosecution relied on unlawfully obtained evidence. *Id.* at 494-95.

41. 428 U.S. 465 (1976).

42. *Id.* at 488-94. The contemporary test for whether the exclusionary rule is justified in a particular case involves balancing the utility of the rule against the costs inflicted by the rule on social policy. Wilson, *supra* note 1, at 1108.

43. Silverthorn Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

44. *See* Note, *supra* note 3, at 356; Casenote, *Administrative Inspections and OSHA: Abridging Fourth Amendment Safeguards? — Textron, Inc. v. Marshall*, 15 Ga. L. Rev. 233, 233 (1980).

45. 359 U.S. 360 (1959).

46. *Id.* at 365-67. The Court used a balancing test which considered the purpose of the search, the time and manner in which it was conducted, and the grounds used by the agency in deciding to make it. *Id.*

47. *Id.* The Court stated that administrative agency searches "touch at most upon the periphery" of the interests protected by the constitutional guarantee of freedom from official intrusion. *Id.* at 367.

48. 387 U.S. 523 (1967).

amendment protection extends to administrative agency searches of business property.[50] Although a few specific exceptions to this view were created in *Colonade Catering Corp. v. United States*[51] and *United States v. Biswell*,[52] the United States Supreme Court continues to adhere to the position advanced in the *Camara* and *See* cases, as evidenced by their express affirmation in *Air Pollution Variance Board v. Western Alfalfa Corp.*[53]

The *Camara* and *See* cases settled the law as to the applicability of the fourth amendment to administrative agency investigations. However, neither case mentioned the applicability of the exclusionary rule to administrative agency searches and seizures.[54] In fact, the United States Supreme Court has never applied the exclusionary rule in an administrative proceeding,[55] which leaves unanswered the question of whether the exclusionary rule pertains to administrative cases.[56]

B. *OSHA Case Law*

Congress enacted the Occupational Safety and Health Act (OSHA)[57] during the time when some exceptions to the *Camara-See* rationale were being created.[58] These exceptions,[59] plus the

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49. 387 U.S. 541 (1967).

50. *Camara*, 387 U.S. at 534. However, the Court ruled that the standard of probable cause required for the issuance of an administrative search warrant may be less stringent than the criminal probable cause standard. *Id.* at 534-39.

51. 397 U.S. 72 (1970). The Court held that no search warrant is required when the business investigated is in an industry which has a long history of government regulation. *Id.* at 76-77.

52. 406 U.S. 311 (1972). The Court ruled that no search warrant is necessary when the business conducted is of a nature which requires governmental regulation. *Id.* at 315-17. In this particular case, the firearms industry was involved and a federal statute authorized warrantless searches. *Id.* at 311-12.

53. 416 U.S. 861, 864 (1974). The Court has also noted its continuing agreement with the *Camara-See* position in Marshall v. Barlow's, Inc., 436 U.S. 307, 312-13 (1978).

54. *See* Note, *supra* note 3, at 358.

55. *Id.* at 387. *See also* Shanks, *Comparative Analysis of the Exclusionary Rule and its Alternatives*, 57 TUL. L. REV. 648, 648 (1983).

56. *See* Note, *supra* note 3, at 343-44, 355-63. Under the current standard announced in Stone v. Powell, the courts must weigh the additional deterrence of future fourth amendment violations against the social costs of excluding the evidence. *See supra* note 41 and accompanying text.

57. 29 U.S.C. §§ 651-678 (1970).

58. *See supra* notes 51-52 and accompanying text.

59. *Id.* The exceptions are based upon the need for regulation for the benefit of society and upon statutes and their related rules allowing warrantless searches. *See* United States v. Biswell, 406 U.S. 311, 325-26 (1972); Colonade Catering Corp. v. United States, 397 U.S. 72, 77 (1970).

fact that the statute does not require that an OSHA inspector obtain a warrant before engaging in a search,[60] led courts to presume the fourth amendment was inapplicable to OSHA inspections.[61] The United States Supreme Court reversed this view in *Marshall v. Barlow's Inc.*,[62] where the protections of the fourth amendment were held to be applicable to OSHA inspections.[63]

In *Barlow's*, the United States Supreme Court found that the warrant clause of the fourth amendment protects commercial buildings as well as private homes and can be applied to both civil and criminal investigations.[64] The Court went on to state that warrantless searches are generally unreasonable, citing *Camara* and *See*. [65] However, only the fourth amendment provisions were found to be applicable to OSHA inspections, and no mention of the exclusionary rule was made.[66] Accordingly, the law is not settled as to whether the exclusionary rule applies to unlawful OSHA searches and seizures.[67]

In the wake of *Barlow's*, the federal courts have had to struggle with the question of whether the exclusionary rule applies to OSHA proceedings. In the first two such cases, *Todd Shipyards Corp. v. Secretary of Labor*[68] and *Savina Home Industries, Inc. v. Secretary of Labor*,[69] two circuit courts came to opposite conclusions.[70] In *Todd*, the Ninth Circuit noted that since the United States Supreme Court had never applied the exclusionary rule to either a civil case or an OSHA investigation, the circuit courts

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60. 29 U.S.C. § 657(a) (1970). *See* Marshall v. Barlow's, Inc., 436 U.S. 307, 309 (1978); Casenote, *supra* note 44, at 234.

61. *See* Trant, *supra* note 1, at 687.

62. 436 U.S. 307 (1978).

63. *Id.* at 311, 324-25. The Court ruled that an employer is "entitled to a declaratory judgment that the [OSHA] is unconstitutional insofar as it purports to authorize inspections without warrant or its equivalent and to an injunction enjoining the Act's enforcement to that extent." *Id.* at 325.

64. *Id.* at 311-13.

65. *Id.* at 312-13. The Court noted that the authority to make warrantless searches "devolves almost unbridled discretion" to the official involved, and that requiring a warrant provides assurances that a neutral party believes the search is reasonable. *Id.* at 323.

66. *See* Trant, *supra* note 1, at 687.

67. *See supra* note 56 and accompanying text.

68. 586 F.2d 683 (9th Cir. 1978).

69. 594 F.2d 1358 (10th Cir. 1979).

70. Both cases were ultimately decided on retroactivity grounds—since the OSHA inspection took place before the *Barlow's* decision was handed down, there was no way for the OSHA inspectors to know about the search warrant requirement. 586 F.2d at 690-91; 594 F.2d at 1363-65.

should not so apply the rule.[71] Conversely, in *Savina,* the Tenth Circuit stated in dicta that the exclusionary rule would be applicable to OSHA proceedings in an appropriate case.[72] After noting that the Supreme Court had applied the exclusionary rule in civil cases which could be characterized as "quasi-criminal," the *Savina* court went on to state that the considerations of judicial integrity and deterring official lawlessness are still of consequence when an illegal search is conducted by the Department of Labor instead of the Department of Justice.[73]

The decisions of the Occupational Safety and Health Review Commission (OSHRC) were also affected by the *Barlow's* case. The OSHRC cases before *Barlow's* never applied the exclusionary rule since it was presumed that the fourth amendment did not pertain to OSHA.[74] Since *Barlow's,* however, the OSHRC has consistently held that, in searches by OSHA inspectors which violate the fourth amendment right of an employer, the evidence obtained must be excluded in any OSHA proceeding against such employer.[75]

IV. Criticisms of the Exclusionary Rule

The exclusionary rule has had a variety of critics over the years, including Congressmen,[76] the American Law Institute,[77] a United States Attorney General,[78] and four Justices on the current United States Supreme Court.[79] As early as 1926, influential legal scholars such as Judge Cardozo criticized the use of the rule.[80] In addition,

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71. 586 F.2d at 689.

72. 594 F.2d at 1363.

73. *Id.* at 1362-63.

74. *See supra* notes 44-47 and accompanying text.

75. *See, e.g.,* Federal Clearing Die Casting Co., 1982 O.S.H.D. ¶ 25,912; Secretary of Labor v. Sarasota Concrete Co., 9 O.S.H.C. (BNA) 1608 (1981); Secretary of Labor v. Genesee Valley Indus. Packaging, 8 O.S.H.C. (BNA) 1509 (1980).

76. Several bills were introduced during the 97th Congress to eliminate or modify the exclusionary rule. Schlag, *supra* note 1, at 875.

77. This association proposed that motions to suppress evidence be granted only if the constitutional violation was substantial after considering all of the circumstances. Model Code of Pre-Arraignment Procedure, § SS 290.2(2) (1975).

78. Attorney General William F. Smith's Task Force on Violent Crime advocated a "reasonable good faith" exception to the exclusionary rule, since the remedy for a violation of a constitutional right should be proportional to the magnitude of the violation. Attorney General's Task Force on Violent Crime, Final Report 55 (August 17, 1981).

79. Chief Justice Burger and Justices Powell, Rehnquist and White have all advocated modification of the exclusionary rule. *See infra* notes 116-22 and accompanying text.

80. Judge Cardozo, sitting on the highest court in the State of New York, made his famous criticism of the exclusionary rule: "[T]he criminal is to go free because the constable has blundered. . . ." People v. Defore, 242 N.Y. 13, 21 (1926).

the United States Supreme Court has recently refused to extend the applicability of the rule to many types of cases.[81] These critics do not contend that the exclusionary rule is not beneficial, but hold the opinion that its costs exceed its benefits in many situations.

Criticisms of the exclusionary rule are varied. Probably the most common complaint is that the use of the rule keeps reliable evidence from the fact-finder. As a result, many wrong-doers go free and both the law and the fact-finding process are distorted.[82] The critics of the rule, noting that it is a judicially created remedy and that its imposition depends upon its related costs and benefits, contend that this is too high a price to pay for the deterrent effect of the rule.[83]

Some critics even dispute that the exclusionary rule acts to deter violations of the fourth amendment to any significant extent. There has never been an empirical study which has shown that the rule does in fact deter official unlawful acts.[84] Additionally, even if it is assumed that the exclusionary rule does deter some official misconduct, its critics claim it has no effect on the majority of search and seizure actions. For instance, it will not deter an official's acts where the main purpose behind the search is other than to obtain evidence for trial or to convict the object of the search.[85] Further, logic dictates that there is no deterrence in cases where the official conducted the search in the belief that he was not in violation of the fourth amendment.[86] In both of these circum-

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81. *See supra* notes 35-42 and accompanying text.

82. *See, e.g.*, Bernardi, *supra* note 1, at 79-80; Goodpaster, *An Essay on Ending the Exclusionary Rule*, 33 HASTINGS L.J. 1065, 1085-87, 1091-94 (1982). *See also* Illinois v. Gates, 103 S. Ct. 2317, 2342 (1983) (White, J., concurring); Irvine v. California, 347 U.S. 128, 136 (1954).

83. *See generally* Bernardi, *supra* note 1; Goodpaster, *supra* note 82, Jensen & Hart, *supra* note 1. *See also* Illinois v. Gates, 103 S. Ct. 2317, 2342 (1983) (White, J., concurring).

84. *See, e.g.*, Bernardi, *supra* note 1, at 75; Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 667 (1970).

The United States Supreme Court has also noted that the deterrent effect of the exclusionary rule has never been established by empirical evidence despite numerous attempts. United States v. Janis, 428 U.S. 433, 449-53 (1976).

85. *See, e.g.*, Bernardi, *supra* note 1, at 76; Shanks, *supra* note 55, at 654-57; Goodpaster, *supra* note 82, at 1083, 1084. *See also* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 417-18 (1971) (Burger, C.J., dissenting).

86. *See, e.g.*, Bernardi, *supra* note 1, at 76; Jensen & Hart, *supra* note 1, at 96.

The United States Supreme Court has noted that there is little if any deterrent effect from the exclusionary rule in cases where the offending officer did not believe that his search violated the Constitution. *See* United States v. Peltier, 422 U.S. 531, 538-39, 542 (1975); Michigan v. Tucker, 417 U.S. 433, 447 (1974). *See infra* notes 123-26 and accompa-

stances, exclusion of the evidence at trial does not serve the purpose of the rule, but enables guilty parties to evade justice.

Another common criticism of the exclusionary rule is that it is not an effective remedy for a constitutional violation. Exclusion of evidence at trial does not repair or redress the individual for the violation of his right of privacy.[87] In addition, the rule is of benefit only to guilty parties, because an illegal search of an innocent person will uncover no evidence which would lead to his being brought to trial. Since the exclusionary rule is the only sanction commonly applied to a fourth amendment violation, the innocent victims of illegal searches are left with a right without a remedy.[88] A further complaint about the remedial aspects of the rule is that its application has the same effect regardless of the degree to which the official's search violated the law or the type of crime of which the defendant is accused. The critics contend that trivial or insignificant violations of the fourth amendment should not be treated in the same manner as blatant ones and that the disparity between the minor infringement of the defendant's rights caused by the search and the huge benefit provided by the application of the rule is contrary to the idea of proportionality engrained in the American concept of justice.[89]

There are numerous other criticisms of the exclusionary rule. Some critics contend that the use of the rule makes police overly cautious in that they will not engage in reasonable and proper searches for fear that the search would be found illegal by the courts.[90] Additionally, the rule causes public disrespect and an unfavorable public opinion of the legal system when its application permits guilty defendants to go free.[91] Furthermore, the critics contend that the existence of the rule has discouraged the development of alternatives which might prove to be more effective in pro-

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nying text.

87. *See, e.g.*, Bernardi, *supra* note 1, at 78; Goodpaster, *supra* note 82, at 1084.

88. *See, e.g.*, Bernardi, *supra* note 1, at 78; Goodpaster, *supra* note 82, at 1084; Shanks, *supra* note 55, at 657.

89. *See, e.g.*, Bernardi, *supra* note 1, at 106-07; Goodpaster, *supra* note 82, at 1085, 1087-88; Shanks, *supra* note 55, at 653-54. *See also* Stone v. Powell, 428 U.S. 465, 490 (1976); Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 418 (Burger, C.J., dissenting).

90. *See, e.g.*, Shanks, *supra* note 55, at 654-57. *See also* Stone v. Powell, 428 U.S. 465, 540 (1976) (White, J., dissenting).

91. *See, e.g.*, Bernardi, *supra* note 1, at 79; Goodpaster, *supra* note 82, at 1089-90; Shanks, *supra* note 55, at 653-54. *See also* Illinois v. Gates, 103 S. Ct. 2317, 2342 (1983) (White, J., concurring).

tecting the fourth amendment right.[92] All of these factors have caused an increasing number of people to call for abandonment or modification of the exclusionary rule.

V. The Good Faith, Reasonable Belief Exception to the Exclusionary Rule

Concerned parties have suggested a variety of methods of enforcing the fourth amendment as alternatives to the exclusionary rule. One viewpoint is that sanctions should be imposed against the individual official or government which conducted the illegal search, such as requiring that criminal charges be brought or allowing the victim to institute a civil action for damages.[93] Another suggestion is that the police and the regulatory agencies be required to have strong, effective internal disciplinary procedures for fourth amendment violators.[94] Other commentators believe that the entire area should be governed by an administrative agency with the power to implement its own regulations, punishments and remedies in cases involving the fourth amendment right.[95] However, the most popular alternative to the present state of the law is the employment of a good faith, reasonable belief exception to the exclusionary rule.

Numerous commentators have made persuasive arguments that illegally obtained evidence should be admissible if the officer conducted the search in good faith and with the reasonable belief that

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92. *See e.g.*, Bernardi, *supra* note 1, at 80-81; Goodpaster, *supra* note 82, at 1094-95. *See also* Stone v. Powell, 428 U.S. 465, 500 (1976) (Burger, C.J., concurring).

93. This practice is followed in England, Canada, the Federal Republic of Germany, and the Union of Soviet Socialist Republics, none of which exclude unlawfully obtained evidence to any appreciable extent. *See* Shanks, *supra* note 55, at 659-70.

Defenders of the exclusionary rule believe that civil or criminal lawsuits would be ineffective in deterring fourth amendment violations. They point out that criminal sanctions already exist, but that the government employs them only in cases of serious abuse. They also note that victims of illegal searches can presently bring civil actions, but that their chances of recovery are slim since plaintiffs who themselves are guilty of violating the law arouse very little sympathy in a jury. *See, e.g.*, Trant, *supra* note 1, at 711-13. *See generally* LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. Pitt. L. Rev. 307 (1982).

94. This practice is used in both England and the Federal Republic of Germany. *See* Shanks, *supra* note 55, at 662-63, 668.

Defenders of the exclusionary rule voice skepticism over whether internal disciplinary proceedings would be an effective alternative remedy. *See, e.g.*, Trant, *supra* note 1, at 714. *See generally* LaFave, *supra* note 93.

95. *See, e.g.*, Goodpaster, *supra* note 82, at 1100-07; Hanscom, *Admissibility of Illegally Seized Evidence in Civil Cases: Could This be the Path Out of the Labyrinth of the Exclusionary Rule?*, 9 Pepperdine L. Rev. 799, 817-18 (1982).

the search was lawful.[96] The main thrust of their argument is based upon the recent position of the United States Supreme Court that deterrence is the only rationale for the exclusionary rule.[97] Accordingly, there is no deterrence when the rule is invoked to suppress evidence obtained by an official acting in good faith and with a reasonable belief that the search did not violate the fourth amendment. The logic involved is that the official's conduct would have been the same regardless of the applicability of the exclusionary rule, as he did not believe any constitutional violation was taking place.[98]

The good faith, reasonable belief exception to the exclusionary rule has its share of critics, some who favor the continuation of the present state of the law and others who propose a different alternative to the exclusionary rule. For instance, some commentators note that enactment of the good faith, reasonable belief exception will disregard both the personal constitutional right and judicial integrity justifications for the exclusionary rule.[99] Other commentators have stated that since acquiring a search warrant would comprise the good faith, reasonable belief conduct necessary to create an exception to the exclusionary rule, investigating officials would engage in "magistrate shopping" to obtain search warrants in cases where the evidence is insufficient to constitute probable cause.[100] Neither of these arguments is very persuasive since the established purpose of the exclusionary rule is to deter the unconstitutional conduct of investigating officials, not to protect the individual's constitutional right of privacy and the court's integrity, or to regulate the activities of magistrates and judges.[101]

A more persuasive argument against the good faith, reasonable belief exception to the exclusionary rule is that it could lead to the

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96. *See, e.g.*, Bernardi, *supra* note 1, at 101-07; Jensen & Hart, *supra* note 1, at 930-36; Leonard, *supra* note 1, at 55-56.

97. *See supra* notes 30-34 and accompanying text. The United States Supreme Court has stated the deterrence justification of the exclusionary rule in the following ways: "[T]he rule's prime purpose is to deter future unlawful police conduct. . . ." United States v. Calandra, 414 U.S. 338, 347 (1974); "The rule is calculated to prevent, not to repair. Its purpose is to deter - to compel respect for the constitutional guaranty . . . by removing the incentive to disregard it." Elkins v. United States, 364 U.S. 206, 217 (1960).

98. *See, e.g.*, Bernardi, *supra* note 1, at 101-02; Jensen & Hart, *supra* note 1, at 932-33; Leonard, *supra* note 1, at 55-56. *See also* Illinois v. Gates, 103 S. Ct. 2317, 2343-44 (1983) (White, J., concurring).

99. *See, e.g.*, LaFave, *supra* note 93, at 340.

100. *See, e.g.*, Trant, *supra* note 1, at 709; LaFave, *supra* note 93, at 353-54.

101. *See supra* notes 30-34 and accompanying text. *See also* Illinois v. Gates, 103 S. Ct. 2317, 2345 (1983) (White, J., concurring).

situation where the ignorant, untrained investigating official will be favored.[102] The major premise of this argument is that if the official is poorly informed about fourth amendment law, almost all of his search and seizure conduct would be in good faith and with the reasonable belief that no constitutional violation has occurred, thus all evidence uncovered would be admissible.[103] Related to this view is that, in cases where an unconstitutional search has taken place but the evidence is admitted, the illegal conduct will not be publicized, so future conduct of the same nature will still be within the exception. In effect, admitting the evidence under the exception will be interpreted as a message that the investigative conduct will be regarded as reasonable in the future.[104] The supporters of the exception contend that this argument is without merit since the courts can use an objective standard in determining whether a search was in fact a reasonable one. Thus, the boundaries of reasonable searches can be determined by the courts and not by the level of knowledge of the investigating official.[105]

A second strong argument against the good faith, reasonable belief exception to the exclusionary rule involves the difficulty of defining or recognizing both "good faith" conduct and "reasonable" actions.[106] Bolstering this argument is the fact that there are no hard and fast rules to determine when someone's conduct was performed in good faith and was reasonable. As a result, it is feared that fourth amendment law will become a series of inconsistent cases, since each judge will have a different standard for evaluating "good faith" conduct and "reasonable" beliefs.[107] However, the proponents of the exception to the rule note that the courts are already required to evaluate the good faith and reasonableness issues in many other areas of law, as well as stating that, in many situations, "reasonableness" can be measured by objective standards.[108]

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102. *See, e.g.*, LaFave, *supra* note 93, at 342-44; Recent Development, *supra* note 30, at 228-29; Schlag, *supra* note 1, at 895-96; Note, *The Emerging Good Faith Exception to the Exclusionary Rule*, 57 NOTRE DAME LAW. 112, 130-31, 134-35 (1981).

103. *See supra* note 102.

104. *Id.* One commentator has stated that a rule admitting evidence has the effect of legitimizing the conduct which produced the evidence. LaFave, *supra* note 93, at 358-59.

105. *See, e.g.*, Bernardi, *supra* note 1, at 104-06; Jensen & Hart, *supra* note 1, at 934-35. *See also* Illinois v. Gates, 103 S. Ct. 2317, 2346-47 (1983) (White, J., concurring).

106. *See, e.g.*, LaFave, *supra* note 93, at 341, 334; Recent Development, *supra* note 10, at 229-30; Note, *supra* note 102, at 132.

107. *See supra* note 106.

108. *See, e.g.*, Bernardi, *supra* note 1, at 104; Jensen & Hart, *supra* note 1, at 934. *See also* Illinois v. Gates, 103 S. Ct. 2317, 2347 (1983) (White, J., concurring).

A final persuasive argument against the adoption of a good faith, reasonable belief exception to the exclusionary rule is the fear that much of the deterrent effect of the rule will be lost. This argument is grounded on the belief that the real beneficiary of the rule is society in general, as the exclusion of evidence removes the incentive to violate the fourth amendment so that the frequency of future violations will decrease. Accordingly, if exceptions to the rule are allowed, an incentive to violate constitutional rights could be created and investigating officials might always choose the broadest possible construction of the standards of conduct, resulting in an increase in the number of fourth amendment violations.[109] The supporters of the exception to the exclusionary rule regard this argument to be without merit. First, since there is no empirical evidence that the exclusionary rule deters unlawful conduct,[110] there is no authoritative evidence that providing an exception to the rule will detract from its deterrent effect.[111] Furthermore, the belief that investigating officers will invariably choose the broadest construction of the law to allow themselves to violate people's rights depicts such officials as law violators in practice—a view that unfairly deprecates both the intentions of the investigating officers as a whole and their actual performance in the execution of their duties. Without evidence upon which to base the claim that intentional violations of the fourth amendment will necessarily increase, this argument is merely unsupported speculation.[112]

Despite the strong criticism, support is growing for the adoption of a good faith, reasonable belief exception to the exclusionary rule. Recently, in *United States v. Williams*,[113] the Fifth Circuit approved the use of the exception in a criminal case.[114] The court reasoned that the exclusionary rule is a judge-made rule designed to enforce constitutional requirements and is justified only by its

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109. *See, e.g.*, LaFave, *supra* note 93, at 346-47, 352-54; Goodpaster, *supra* note 82, at 1097.

110. *See supra* note 84 and accompanying text.

111. *See, e.g.*, Bernardi, *supra* note 1, at 105; Note, *supra* note 1, at 823. *See also* Illinois v. Gates, 103 S. Ct. 2317, 2343 (1983) (White, J., concurring).

112. *See* Bernardi, *supra* note 1, at 105. This commentator stated that the exclusionary rule will not significantly deter intentional or bad faith violations of the fourth amendment, as the violator can distort the facts at a suppression hearing to avoid exclusion of the improperly gained evidence. He advocates criminal sanctions, civil tort remedies, and internal department investigations to try to deter intentional violations of search and seizure law. *Id.*

113. 622 F.2d 830 (5th Cir. 1980).

114. *Id.* at 846-47.

deterrence of future police misconduct. After noting that the benefit of the rule must be balanced against its costs, the court held that it should not be applied in contexts where it does not effectively deter official misconduct, such as in cases where the investigative actions were undertaken in good faith and were objectively reasonable.[115]

Four Justices on the current Supreme Court have also voiced support for the good faith, reasonable belief exception to the exclusionary rule. Chief Justice Burger, an early critic of the exclusionary rule,[116] advocated the exception to the rule in his concurring opinion in *Stone v. Powell*.[117] Justice Powell argued in favor of the exception to the rule in *Brown v. Illinois*,[118] as did Justice Rehnquist in *United States v. Peltier*.[119] The most outspoken member of the Court in advocating a good faith, reasonable belief exception to the exclusionary rule is Justice White. In his dissenting opinion in *Stone v. Powell*,[120] he expressed this belief by stating:

> When law enforcement personnel have acted mistakenly, but in good faith and on reasonable grounds, and yet the evidence they have seized is later excluded, the exclusion can have no deterrent effect. The officers, if they do their duty, will act in similar fashion in similar circumstances in the future; and the only consequence of the rule as presently administered is that unimpeachable and probative evidence is kept from the trier of fact and the truth-finding function of proceedings is substantially impaired or a trial totally aborted.[121]

Justice White has recently made similar statements in his concur-

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115. *Id.* at 841-42. The Fifth Circuit made the following statement:

> Sitting en banc, we now hold that evidence is not to be suppressed under the exclusionary rule where it is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though mistaken, belief that they are authorized. We do so because the exclusionary rule exists to deter willful or flagrant actions by police, not reasonable, good-faith ones. Where the reason for the rule ceases, its application must cease also. The costs to society of applying the rule beyond the purposes it exists to serve are simply too high . . . with few or no offsetting benefits.

Id. at 840.

116. *See* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting).

117. 428 U.S. 465, 496 (1976) (Burger, C.J., concurring).

118. 422 U.S. 590, 606 (1975) (Powell, J., concurring). Justice Powell noted that the exclusionary rule necessarily assumes that the investigating official has engaged in willful, or at least negligent, conduct. He reasoned that when this premise is lacking, the deterrence rationale of the rule does not obtain, and there is no legitimate justification for depriving the prosecution of the evidence. *Id.* at 612.

119. 422 U.S. 531, 542 (1975).

120. 428 U.S. 465, 536 (1976) (White, J., dissenting).

121. *Id.* at 540.

ring opinion in *Illinois v. Gates*.[122]

Furthermore, the Court has, in its majority opinions, frequently noted that the good faith and reasonableness of the conduct by the investigating official should have an effect upon the application of the exclusionary rule. In *Michigan v. Tucker*,[123] the Court declared:

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care towards the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.[124]

The Court's statement regarding the good faith and reasonableness of the investigating officer's actions was more direct in *United States v. Peltier*:[125] "If the purpose of the exclusionary rule is to deter unlawful police conduct then evidence obtained from a search should be suppressed only if it can be said that the officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment."[126] Subsequently, the Court has alluded to the good faith and reasonableness of the investigating officer's conduct as it pertains to the application of the exclusionary rule in *Brown v. Illinois*[127] and *United States v. Janis*.[128]

VI. The Application of the Good Faith, Reasonable Belief Exception to the Exclusionary Rule to OSHA Searches and Seizures

When considering the differing positions taken by the Justices of the United States Supreme Court, the lower federal courts, and the legal commentators, it is not surprising that there is a conflict between the only two cases decided by the federal courts of appeals regarding the use of a good faith, reasonable belief exception to the exclusionary rule when an OSHA search violated the fourth

122. 103 S. Ct. 2317, 2336 (1983) (White, J., concurring).
123. 417 U.S. 433 (1974).
124. *Id.* at 447.
125. 422 U.S. 531 (1975).
126. *Id.* at 542.
127. 422 U.S. 590, 603-04 (1975).
128. 428 U.S. 433, 453-54 (1976).

amendment. Although the OSHRC has consistently applied the exclusionary rule since the *Barlow's* decision,[129] the Seventh Circuit and the Eleventh Circuit have reached opposite conclusions in their reviews of the OSHRC decisions.

In *Donovan v. Sarasota Concrete Co.*,[130] the Eleventh Circuit upheld the OSHRC decision that a good faith exception to the exclusionary rule is not applicable to an illegal OSHA search.[131] The court noted that the primary function of the exclusionary rule is to deter unlawful conduct and that the United States Supreme Court continues to adhere to the position that some form of exclusion is necessary to deter violations of the fourth amendment.[132] The court went on to state that the ultimate issue of the case was not the good faith of the investigating officer, but whether the officer lawfully obtained the evidence.[133] In its holding, the court merely agreed with the OSHRC that the cost of suppressing the evidence "was outweighed by the need to ensure widespread OSHA agent compliance with the fourth amendment."[134]

Conversely, in *Donovan v. Federal Clearing Die Casting Co.*,[135] the Seventh Circuit reversed an OSHRC decision applying the exclusionary rule and ruled that a good faith, reasonable belief exception to the exclusionary rule is appropriate under the proper circumstances.[136] The court noted that the exclusionary rule has no deterrent effect when law enforcement personnel have acted mistakenly, but in good faith and on reasonable grounds.[137] After stating that suppression of relevant and incriminating evidence can cause substantial societal harm, the court declared that the employment of the exclusionary rule can allow noncompliance with

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129. *See supra* notes 74-75 and accompanying text.

130. 693 F.2d 1061 (11th Cir. 1982).

131. *Id.* at 1063.

132. *Id.* at 1070. The court stated that, if the exclusionary rule is the proper enforcement tool to deter future unlawful conduct, its application in an OSHRC proceeding is not improper. *Id.* at 1071.

133. *Id.* at 1072.

134. *Id.* The court declared that the OSHRC is in a good position to determine if the exclusionary sanction is an appropriate mechanism in its own proceedings, subject to review by the judicial courts. Since the Commission has a special expertise in the area of OSHA practices and procedures, it is best able to evaluate the deterrent impact of the exclusionary rule. *Id.*

135. 695 F.2d 1020 (7th Cir. 1982).

136. *Id.* at 1022-25.

137. *Id.* at 1023. The court twice noted that the OSHA compliance officer obtained a search warrant and conducted the search in good faith and with the reasonable belief that the activities were lawful. *Id.* at 1021, 1025.

OSHA.[138] Accordingly, the court held that evidence gathered through OSHA's reasonable and good faith inspection should not be suppressed by the exclusionary rule, even if the fourth amendment right was violated.[139]

VII. Conclusion

Throughout its history, the exclusionary rule has never been consistently applied pursuant to any one rationale.[140] The rule itself is of very recent origin, and has been applied in administrative cases only within the past sixteen years.[141] Indeed, the wording of the fourth amendment does not command exclusion, nor can it be logically inferred that, after an investigating officer has committed a trespass, the evidence so obtained shall be inadmissible in a trial against the victim of the trespass.[142] Add to this the valid criticisms of the rule, and application of a good faith, reasonable belief exception to the exclusionary rule in administrative cases becomes more attractive.

The criticisms of the good faith, reasonable belief exception to the exclusionary rule, though persuasive, are totally speculative.[143] Since the exception has been used in only one federal circuit,[144] and that very recently, there is no concrete evidence of its benefits and detriments. Until the exception is applied, it will not be known whether, as a whole, it is beneficial to society or not.

Cases brought under OSHA provide an ideal starting point for the employment of a good faith, reasonable belief exception to the exclusionary rule. First, there already exist substantial deterrents to OSHA violations of the employer's constitutional rights. In addition to requiring an OSHA inspector to obtain a search warrant from a neutral magistrate to inspect premises when an employer objects, the employer may move to quash a warrant prior to its execution or refuse entry pursuant to such warrant unless OSHA

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138. *Id.* at 1024.

139. *Id.* at 1023. The court's rationale for the decision rested on the view that good faith, reasonably based violations of the fourth amendment cannot be deterred by the exclusionary rule. *Id.* at 1023-25.

140. *See supra* notes 13-34 and accompanying text. *See generally* Trant, *supra* note 1; Wilson, *supra* note 1; Schlesinger & Wilson, *supra* note 1; Note, *supra* note 1; LaFave, *supra* note 93; Recent Development, *supra* note 30; Schlag, *supra* note 1; Bernardi, *supra* note 1.

141. *See supra* notes 48-50 and accompanying text.

142. Wilson, *supra* note 1, at 1073.

143. *See supra* notes 99-112 and accompanying text.

144. United States v. Williams, 622 F.2d 830 (5th Cir. 1980).

has previously prevailed in a civil contempt proceeding.[145]

A second reason that the good faith, reasonable belief exception to the exclusionary rule should be applicable to OSHA cases relates to the purpose of the Act in protecting the health and safety of the country's employees.[146] When the physical well-being of innocent people is at stake, society's norms dictate that evidence of safety violations should not be suppressed under any circumstances, much less when such evidence was obtained by an OSHA inspector acting in good faith and with the reasonable belief that the inspection was lawful. The important public policy of the health and welfare of the country's citizens must take precedence over the privacy rights of employers, especially when there is no proof that applying the exception to the exclusionary rule will increase the number of fourth amendment violations.

Finally, OSHA cases, by the nature of the penalties and defendants involved, are ideal cases in which to apply the good faith, reasonable belief exception to the exclusionary rule. The cases are of a civil nature and generally involve relatively insignificant penalties.[147] Thus, the rules of evidence can be a little more flexible than in criminal cases carrying more severe penalties. Furthermore, the privacy rights involved are those of an artificially-created entity and not an individual person. Certainly the expectations of privacy are vastly different as between the individual, for whose protection the exclusionary rule was developed, and a business enterprise which exists solely for financial profit.

The controversy over the exclusionary rule, and the proposed exception to it, could be ended sometime in 1984, as the Supreme Court has decided to review three criminal cases involving evidence excluded under the rule.[148] If the Court applies a good faith, reasonable belief exception to the exclusionary rule in criminal cases, it will certainly be applicable to OSHA cases where the consequences of the unconstitutional search are much less severe.

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145. Rockford Drop Forge Co. v. Donovan, 672 F.2d 626, 631 (7th Cir. 1982). *See also* Donovan v. Federal Clearing Die Casting Co. 695 F.2d 1020, 1024 (7th Cir. 1982).

146. The statute was enacted to provide "safe and healthful working conditions and to preserve our human resources." 29 U.S.C. § 651(b) (1976).

147. The statute provides for abatement orders requiring the employer to undertake remedial repairs to eliminate the unsafe condition. 29 U.S.C. § 658 (1976). The statute also imposes penalties for some violations. 29 U.S.C. § 666(a)-(d), (h) (1976). OSHA further provides for subsequent citations, enhanced penalties, and imprisonment for willful, repetitive or continuing violations. 29 U.S.C. § 666 (e)-(g) (1976).

148. *See* Massachusetts v. Sheppard, 387 Mass. 488, 441 N.E.2d 725 (1982), *cert. granted*, 103 S. Ct. 3534 (1983).

However, if the Court refuses to apply the exception in criminal cases, it could still be applicable to civil cases—especially OSHA cases where the use of the exception seems particularly appropriate.

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